IN THE

Supreme Court of the United States

OCTOBER TERM, 1961

No. 481

BENNY LURK, *Petitioner*

v.

UNITED STATES OF AMERICA

On Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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BRIEF ON BEHALF OF THE CHIEF JUDGE AND THE ASSOCIATE JUDGES OF THE UNITED STATES COURT OF CUSTOMS AND PATENT APPEALS, AMICI CURIAE

THE INTEREST OF THE AMICI CURIAE

This case presents the question, whether a judge who retired from the Court of Customs and Patent Appeals prior to 1958 could constitutionally preside at petitioner's criminal trial in the United States District Court for the District of Columbia. Considera-

tion of this issue may lead to the question, whether the Court of Customs and Patent Appeals is a constitutional or a legislative court. The *amici curiae* have an obvious interest in the determination of these questions, which touch directly upon the status of the Court of Customs and Patent Appeals and its judges.

SUMMARY OF ARGUMENT

1. The decision in *Ex parte Bakelite Corp.*, 279 U.S. 438 (1929) was based upon mistaken premises and should be re-examined and overruled. The Payne-Aldrich Tariff Act of August 5, 1909, which created the Customs Court, conferred upon that Court the jurisdiction of a constitutional or Article III court, to determine certain cases and controversies arising under the Constitution, the laws of the United States, and treaties. Prior to the enactment of the Payne-Aldrich Tariff Act, this identical jurisdiction was exercised by the circuit courts, with review by the circuit courts of appeals and by this Court. There can be no doubt that such jurisdiction was determinative and judicial in character, and not administrative or advisory. Our conclusion as to the nature of the customs jurisdiction of the Court of Customs Appeals is reinforced by the fact that this Court now exercises general certiorari jurisdiction to review judgments in customs cases. It is no answer to say that the judgments of the Customs Court were not judicial determinations, since the matters involved in appeals to that court had been at times confided for determination to the executive branch of the government. There are many matters within the jurisdiction of Article III district courts which Congress might entrust to executive or administrative determination. An example of

such matters is found in the Federal Tort Claims Act (28 U.S.C. 1346) which affords a judicial remedy to one injured by the negligent act of a government employee, but which might have provided a remedy by way of an appeal to an executive or an administrative body.

The particular jurisdiction of the Court of Customs Appeals which was involved in the *Bakelite* case was the jurisdiction of that court to review, on questions of law, the proceedings of the Tariff Commission leading to recommendations to the President in respect of tariffs. This jurisdiction was not conferred upon the court until 13 years after its creation and such matters have constituted only a minute fraction of the court's business. The substantial and fundamental jurisdiction of the court, under both the Payne-Aldrich Tariff Act of 1909 and the Tariff Act of 1930, has had to do with cases and controversies which receive judicial determination and in which the court renders final and binding judicial decisions.

The opinion in the *Bakelite* case was mistaken in describing the patent and trade-mark jurisdiction of the Court of Customs and Patent Appeals as "advisory". Although this description was supported by the decision in *Postum Cereal Company* v. *California Fig Nut Company,* 272 U.S. 693 (1927), a change in the statute, two months after the *Postum* decision, gave finality to appellate decisions in patent and trade-mark cases. This statutory change was apparently not brought to the attention of this Court at the time of the argument in the *Bakelite* case. In later patent cases, *Hoover Co.* v. *Coe,* 325 U.S. 79 (1945) and *Special Equipment Co.* v. *Coe,* 324 U.S. 370 (1945),

this Court has recognized the finality of patent judgments in District Court proceedings, which stand upon the same footing with respect to finality as judgments of the Court of Customs and Patent Appeals.

2. Even assuming that the Court of Customs and Patent Appeals is a "legislative court", Congress had power under Article I, Section 8, Clause 17 of the Constitution to provide for the assignment of Judge Jackson to the United States District Court for the District of Columbia. In providing for such assignment, Congress acted as a legislature for the District of Columbia, exercising the same powers that are vested in a state legislature. From early days, Congress has recognized the unique status of the District of Columbia courts and in particular the fact that they play a dual role, exercising at the same time the jurisdiction of United States District courts and the jurisdiction of state courts. Thus, Congress has established special statutory or "legislative" courts for the trial of criminal cases in the District of Columbia. Such a court is the Municipal Court for the District of Columbia, which, concurrently with the United States District Court, now has original jurisdiction over all cases involving misdemeanors committed in the District of Columbia. Although a defendant in the Municipal Court is, of course, entitled to a jury trial and to the other guaranties of personal liberty provided in the Constitution, that Court is nevertheless a "legislative" court. It is plain that Congress, in its capacity as a legislature for the District of Columbia, might constitutionally provide for the trial of all District of Columbia criminal cases before such a legislative court; and this being so, the petitioner was deprived of no constitutional

right even though he was tried before a "legislative" judge.

Judge Jackson was appointed a Judge of the United States by the President with the advice and consent of the Senate, pursuant to a statute providing that he should hold office during good behavior. It is fanciful to suggest that he lacks the independence necessary to qualify him for service in a criminal trial in the United States District Court for the District of Columbia. If the petitioner's argument to this effect be sound, then all of the proceedings of the inferior criminal courts of the District of Columbia for over one hundred years have been unconstitutional and void.

ARGUMENT

The *amici curiae* support the position of the United States, that the Court of Customs and Patent Appeals is a court created and existing under Article III of the Constitution. The *amici curiae* also agree with the government that, even assuming the "legislative" character of the Court of Customs and Patent Appeals, Congress was empowered by the Constitution, Article I, Section 8, Clause 17, to authorize the judges of that court, including retired judges, to serve on the superior courts of the District of Columbia.

Without repeating all of the arguments advanced in the government's able and scholarly brief, the *amici curiae* wish to add a few words to focus attention upon certain matters which in their opinion are of particular importance and significance.

I

The Decision in Ex Parte Bakelite Corp., 279 U.S. 438 (1929) Should Be Re-Examined and Overruled

The cornerstone of the petitioner's argument is the proposition that the Court of Customs and Patent Appeals is a legislative court, exercising only such powers as could be exercised by executive officers of the government and incapable of receiving "Article III powers". (Petitioner's Brief, pp. 44 ff). The petitioner rests this proposition upon the decision of this Court in *Ex parte Bakelite Corp.*, 279 U.S. 438 (1929). While we agree, of course, that the petitioner has correctly stated the holding of the *Bakelite* case, we submit, with all respect, that the *Bakelite* decision should be re-examined and overruled.

The basis of the *Bakelite* decision was the Court's finding that:

> ". . . The full province of the court under the act creating it is that of determining matters arising between the government and others in the executive administration and application of the customs laws. These matters are brought before it by appeals from decisions of the customs court, formerly called the board of general appraisers. The appeals include nothing which inherently or necessarily requires judicial determination but only matters the determination of which may be, and at times has been, committed exclusively to executive officers. True, the provisions of the customs laws requiring duties to be paid and turned into the treasury promptly, without awaiting disposal of protests against rulings of appraisers and collectors, operate in many instances to convert the protests into applications to refund part or all of the money paid, but this does not make the matters involved in the protests any the less susceptible of determination by executive offi-

> cers. In fact their final determination has been at times confided to the Secretary of the Treasury, with no recourse to judicial proceedings." (279 U.S. 458).

From this premise, the Court reached the conclusion that the Court of Customs Appeals was a legislative court. The "true test" said the Court, "lies in the power under which the court was created and in the jurisdiction conferred." (279 U.S. 459).

The Court of Customs Appeals—now the Court of Customs and Patent Appeals—was created by the Payne-Aldrich Tariff Act of August 5, 1909,[1] to review the customs decisions of the Board of General Appraisers, now the Customs Court. The Act (Sec. 29, para. 7) provided that the Court of Customs Appeals:

> "* * * shall exercise exclusive appellate jurisdiction to review by appeal, as provided by this Act, final decisions by a Board of General Appraisers in all cases as to the construction of the law and the facts respecting the classification of merchandise and the rate of duty imposed thereon under such classification, and the fees and charges connected therewith, and all appealable questions as to the jurisdiction of said board, and all appealable questions as to the laws and regulations governing the collection of the customs revenues; and the judgment or decrees of said Court of Customs Appeals shall be final in all such cases."

Prior to the enactment of the Payne-Aldrich Tariff Act of August 5, 1909, the circuit courts exercised appellate jurisdiction over the decisions of the Board of General Appraisers, with the right of Appeal to

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[1] c. 6, Sec. 28, 36 Stat. 11, 91, 105-108. The pertinent test of the statute is set forth in the Appendix to the government's Brief, p. 121 ff.

the Circuit Courts of Appeals, and with certificate and certiorari jurisdiction in this Court.[2] Pursuant to this statutory scheme, many appeals from the decisions of the Board of General Appraisers were heard by the circuit courts and were reviewed by the Circuit Courts of Appeals and by this Court. See e.g. *Goat & Sheepskin Co.* v. *United States,* 206 U.S. 194 (1907); *Faber* v. *United States,* 221 U.S. 649 (1911).

No argument is necessary to demonstrate that the appeals from decisions of the Board of General Appraisers which were heard by the Circuit Courts and reviewed by the Circuit Courts of Appeals and by this Court were "cases" and "controversies" arising under the Constitution, the laws of the United States, and treaties. In other words, the jurisdiction of these Article III courts in respect of such matters was determinative and judicial in character, and not administrative or advisory. And, as we have seen, this was precisely the jurisdiction which was transferred to the Court of Customs Appeals by the Payne-Aldrich Tariff Act of 1909.

Moreover, the Payne-Aldrich Tariff Act further provided (para. 6) that all customs cases then pending in a circuit or district court might be reviewed on appeal by the Court of Customs Appeals. If the reasoning of the *Bakelite* decision is sound, then it would appear that the circuit and district courts—Article III courts—were exercising legislative or administrative powers in customs cases; and that after the passage of the Payne-Aldrich Act, the Court of Customs Appeals—a legislative court—was exercising appellate

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[2] Act of March 3, 1891, c. 517, Sec. 5-6, 26 Stat. 826, 827-828; Act of May 27, 1908, c. 205, Sec. 2, 35 Stat. 404.

jurisdiction over the judgments of Article III courts. We submit that such reasoning cannot be sustained.

Our conclusion as to the nature of the jurisdiction of the Court of Customs Appeals is reinforced by the fact that by the Act of August 22, 1914, c. 267, 38 Stat. 703, the Supreme Court was given limited certiorari jurisdiction to review cases from the Court of Customs Appeals; and that since 1930 this Court has had and has exercised general certiorari jurisdiction with respect to such judgments. Tariff Act of June 17, 1930, c. 497, Sec. 647, 46 Stat. 76; see e.g. *United States* v. *George S. Bush & Co., Inc.*, 310 U.S. 371 (1940); *Barr* v. *United States*, 324 U.S. 83 (1945).

We submit further that the opinion in the *Bakelite* case was mistaken in concluding that since the matters involved in appeals to the Customs Court had been at times confided for determination to the Secretary of the Treasury, without recourse to judicial proceedings, the judgments of the Customs Court were not judicial. As this Court said in *Den* v. *The Hoboken Land and Improvement Co.*, 18 How. 272, 284 (1856):

> "* * * there are matters, involving public rights, which may be presented in such form that the judicial power is capable of acting on them, and which are susceptible of judicial determination, but which congress may or may not bring within the cognizance of the courts of the United States, as it may deem proper."

The fact that a citizen aggrieved by a judgment of the Board of General Appraisers at one time had only a remedy by way of an administrative appeal, or even no remedy at all, should not, we submit, alter or effect the judicial character of his remedy by way of an appeal

to a United States court, as provided by the Payne-Aldrich Act. There are many matters within the jurisdiction of Article III district courts which Congress might have entrused to executive or administrative determination. For example, it was not until recently that the Federal Tort Claims Act (28 U.S.C. 1346) afforded a judicial remedy to one injured by the negligent act of a government employee; and Congres might have confided the determination of such claims to an executive or administrative body. It cannot be doubted, however, that actions under the Federal Tort Claims Act are the proper business of Article III Federal courts, and that judgments in such actions are judicial judgments.

The particular jurisdiction of the Court of Customs Appeals which was involved in the *Bakelite* case was the jurisdiction of that Court to review, on questions of law, the proceedings of the Tariff Commission leading to recommendations to the President in the matter of tariffs. This jurisdiction was conferred upon the Court by Section 316 of the Tariff Act of 1922, 42 Stat. 943—thirteen years after the creation of the Court of Customs Appeals. Only six cases under Section 316 of the Tariff Act of 1922, and the corresponding Section 337 of the Tariff Act of 1930, have ever reached the Court of Customs Appeals and the Court of Customs and Patent Appeals. These cases are carried in a special docket maintained by the Court, indicating that such matters are rare, and in fact, almost unique in the catalogue of the Court's business. Certainly, the constitutional status of the Court should not depend upon such a minute fraction of its jurisdiction.

The present customs jurisdiction of the Court of Customs and Patent Appeals arises out of the Act of June 17, 1930, known as the "Tariff Act of 1930" (19 USCA 1554, et seq), together with the Reciprocal Trade Agreements Act of June 12, 1934, as Extended, 19 USCA 1351, et seq. Seventy-five percent of the merchandise covered by the Tariff Act of 1930 has been made the subject of trade agreements under the Reciprocal Trade Agreements Act of 1934 and extensions thereof. Questions arising under these statutes and international agreements are not matters which "include nothing which inherently or necessarily requires judicial determination * * * matters the determination of which may be * * * committed exclusively to executive officers". On the contrary, they are cases which must receive judicial determination, and which do receive judicial determination in the Court of Customs and Patent Appeals. A few examples will suffice to illustrate the point.

In *United States* v. *Schmidt Pritchard & Co., Mangano Cycles Co.,* 47 CCPA 152, cert. den, 364 U.S. 919, C.A.D. 750 (1960), the Court of Customs and Patent Appeals held that a Presidential Proclamation setting a rate of duty exceeded the powers of the President and was therefore void. Certiorari was denied by this Court (364 U.S. 919), the judgment of the Court of Customs and Patent Appeals became final, and the rate of duty which the President had undertaken to set was abrogated. In *Star-Kist Foods, Inc.* v. *United States,* 47 CCPA 52, 275, F. 2d 472, C.A.D. 728 (1959), the appellant challenged the constitutionality of the Trade Agreements Act of 1934 and the validity of a trade agreement with Iceland, made pursuant thereto. The Court held that the Trade Agreements Act was

constitutional and the trade agreement with Iceland was valid. In *United States* v. *The Best Foods, Inc.*, 47 CCPA 163, C.A.D. 751 (1960), the appellant challenged a Presidential proclamation imposing an additional fee of two cents a pound on an increased peanut quota of fifty-one million pounds, pursuant to the Agricultural Adjustment Act, as Amended, 7 U.S.C. 624. The Court held that the Presidential proclamation was invalid insofar as it imposed a fee.

It would be going far to hold that the matters involved in such cases are only matters which might be committed exclusively to the determination of executive officers. Indeed, we believe that it would be both unjust and absurd to submit to the determination of an executive officer a case in which a private litigant challenges the formal and considered action of the Chief Executive. Obviously, fairness requires that such a challenge be submitted to an independent and impartial judicial tribunal.

The action of the Court of Customs Appeals, which was presented for the examination of the Supreme Court in the *Bakelite* case, was far different from the judgments of the Court in the cases we have cited. In the *Bakelite* case, the Court of Customs Appeals, pursuant to Section 316 of the Tariff Act of 1922, reviewed proceedings leading to a *recommendation* to the President by the Tariff Commission. The distinction between such a review of a recommendation and a final and binding judicial decision between litigants is obvious.

The opinion in the *Bakelite* case refers to the patent jurisdiction of the Court of Customs Appeals as "the advisory jurisdiction in respect of appeals

from the Patent Office which formerly was vested in the court of appeals of the District of Columbia". (279 U.S. 460). The "advisory" nature of this jurisdiction was thought to buttress the conclusion that the Court of Customs Appeals was a legislative court. We submit, however, that the opinion was in error in describing the jurisdiction as "advisory".

The reference to "advisory jurisdiction" was consistent with the decision in *Postum Cereal Co.* v. *California Fig Nut Co.*, 272 U.S. 693 (1927). In that case, this Court held that a decision of the Court of Appeals of the District of Columbia under Section 9 of the Act of February 20, 1905, instructing the Commissioner of Patents as to whether or not a trade-mark should be registered, was not a judicial judgment. The Court said (272 U.S. 698, 699):

> "It is a mere administrative decision. It is merely an instruction to the Commissioner of Patents by a court which is made part of the machinery of the Patent Office for administrative purposes. In the exercise of such function it does not enter a judgment binding parties in a case as the term 'case' is used in the third article of the Constitution. Section 9 of the Trade-Mark Act of 1905, applies to the appeal taken under it the same rules which under § 4914, Rev. Stat. Comp. Stat. § 9459, 7 Fed. Stat. Anno. 2d ed. p. 202 apply to an appeal taken from the decision of the Commissioner of Patents in patent proceedings. * * * Neither the opinion nor decision of the court of appeals under § 4914, Rev. Stat. or § 9 of the Act of 1920, precludes any person interested from having the right to contest the validity of such patent or trademark in any court where it may be called in question. This result prevents an appeal to this court which can only review judicial judgments."

At the time of the *Postum* decision on January 3, 1927, there was reason to hold that patent and trademark proceedings in the Court of Appeals for the District of Columbia were advisory or administrative. At that time, the statutes governing such appeals (RS 4915, 4916) permitted a litigant disappointed by the rulings of the Patent Office to take a direct appeal to the Court of Appeals and then, if still dissatisfied with the appellate ruling of that Court, to institute an equity suit in the United States District Court to compel the issuance of the patent. The appeal to the Court of Appeals for the District of Columbia and the original proceeding in equity were not mutually exclusive; in fact the statute was construed to require an appeal before an equity suit could be filed. *Kirk* v. *Commissioner,* 16 D.C. (5 Mackey) 229 (1886); *Fekete* v. *Robertson,* 57 App. D.C. 73, 17 F. 2d 335 (1927); *Cooper* v. *Robertson,* 38 F. 2d 852 (1930). However, on March 2, 1927, two months after the *Postum* decision, Congress amended the statute, making the equity suit and the appeal to the Court of Appeals for the District of Columbia mutually exclusive. 44 Stat. 1336 (1927). Thereafter, a litigant was required to elect between a review by the Court of Appeals for the District of Columbia and a proceeding in the District Court under the provisions of RS 4915 or 4916; and in either case the resulting judgment was final. This is the law today, that is, an applicant may appeal to the Court of Customs and Patent Appeals or he may bring a civil action in the United States District Court for the District of Columbia; but he may not pursue both remedies, and the judgment in either case is final. 35 U.S.C. 145, 146.

We find no reference in the briefs and records in the *Bakelite* case to this change in the statute, subsequent to the *Postum* decision, and there is no mention of the change in the *Bakelite* opinion.

The Court in the *Postum* case found an additional indication, that the patent and trademark decisions of the Court of Appeals of the District of Columbia lacked finality, in the fact that the validity of a patent or trade-mark issued as a result of such a decision might be challenged in a later independent suit, such as an infringement action. It was thought that this fact precluded review of such judgments by this Court. The petitioner in his brief (p. 52) now cites the *Postum* case as authority for his claim that patent and trade-mark judgments of the Court of Customs and Patent Appeals are likewise non-reviewable administrative judgments. In this connection, petitioner also cites *Pacific Northwest Canning Co.* v. *Skookum Packers Assn.*, 283 U.S. 858 (1931), and *McBride* v. *Teeple,* 311 U.S. 649 (1940). In these cases, certiorari to review decisions of the Court of Customs and Patent Appeals was denied "for want of jurisdiction", and in each case this Court cited the *Postum* case as a basis for the denial. The *Skookum Packers* case involved a trade-mark, while *McBride* v. *Teeple* was a patent case. The flaw in the petitioner's argument, however, is that nineteen years after the denial of certiorari in the *Skookum* case and fifteen years after the denial in the *Teeple* case, this Court reviewed on the merits two patent cases which originated in the United States District Court for the District of Columbia under RS 4915, *Hoover Co.* v. *Coe,* 325 U.S. 79 (1945); *Special Equipment Co.* v. *Coe,* 324 U.S. 370 (1945); and that with respect to patent validity,

District Court patent proceedings under RS 4915 have no more finality than proceedings in the Court of Customs and Patent Appeals. Whether a patent issues as a result of an appeal to the Court of Customs and Patent Appeals or as a result of a proceeding in the District Court, it can, in a later suit, be challenged and held invalid. See *Battery Patents Corp.* v. *Chicago Cycle Supply Co.*, 111 F. 2d 861 (CCA 7, 1940), in which a patent issued as a result of proceedings under RS 4915 in the District of Columbia courts was held to be invalid. We submit, therefore, that the conclusion is plain that this Court no longer recognizes as sound and controlling the theory that a patent judgment lacks finality merely because the applicant's patent may be questioned in some later and independent proceeding. It would seem that this Court now follows the reasoning that a judgment which concludes the rights of the parties before the Court is in fact a final judicial judgment.

We submit that the decision in the *Bakelite* case was based upon mistaken premises and that it should be overruled.

II

Even Assuming the Legislative Character of the Court of Customs and Patent Appeals, Congress Had Power Under the District of Columbia Clause of the Constitution to Authorize the Judges of That Court, Including Retired Judges, to Serve on the Superior Courts of the District

At the time of Judge Jackson's appointment to the Court of Customs and Patent Appeals in 1937, a statute provided (28 U.S.C. 22 (1934 ed)):

> "The judges of the United States Court of Customs and Patent Appeals, or any of them, whenever the business of that court will permit, may if in the judgment of the Chief Justice of the

> United States the public interest requires, be designated and assigned by him for service from time to time, and until he shall otherwise direct, in the Supreme Court of the District of Columbia or the United States Court of Appeals for the District of Columbia, when requested by the Chief Justice of either of said courts." (28 U.S.C. § 22 (1934 ed)).

In 1958, the statute was broadened to provide for assignments to courts throughout the country. 28 U.S.C. 291-295 (1958 ed). The assignment of retired judges was specifically authorized (28 U.S.C. 294; Appendix to Government's Brief, p. 120), and it was pursuant to this provision that Judge Jackson was assigned by the Chief Justice to serve as District Judge of the United States District Court for the District of Columbia (Petitioner's Brief, p. 11).

We submit that the United States Court of Appeals for the District of Columbia Circuit was correct in its conclusion that in view of the "broad sweep" of the legislative authority of Congress over the Federal District there can be no doubt of the power of Congress to provide for the assignment of Judge Jackson to the District of Columbia court.

Judge Jackson was appointed a Judge of the United States by the President of the United States with the advice and consent of the Senate. He was appointed and commissioned pursuant to a statute providing that he should hold office during good behavior. In the light of these facts, it seems fanciful to suggest that he lacks the independence necessary to qualify him for service on any United States District Court. It would seem that as a Judge of the United States (see 28 U.S.C. 451) with life tenure, he might con-

stitutionally be assigned to any United States Court as Congress might provide. Because of the unique status of the District of Columbia courts, however, we need not reach the general question of whether Congress might constitutionally provide for the assignment of a judge of the Court of Customs and Patent Appeals to a District Court in any jurisdiction other than the District of Columbia.

In *O'Donoghue* v. *United States,* 289 U.S. 516 (1933) this Court said (289 U.S. 545):

> "* * * In dealing with the District, Congress possesses the powers which belong to it in respect of territory within a state, and also the powers of a state. *Keller* v. *Potomac Electric Power Co.,* 261 U.S. 428, 442, 443. 'In other words,' this court there said, 'it possesses a dual authority over the District and may clothe the courts of the District not only with the jurisdiction and powers of federal courts in the several States but with such authority as a State may confer on her courts. *Kendall* v. *United States,* 12 Pet. 524, 619. * * * Subject to the guaranties of personal liberty, in the amendments and in the original constitution, Congress has as much power to vest courts of the District with a variety of jurisdiction and powers as a state legislature has in conferring jurisdiction on its courts."

Again, in *The American and Ocean Insurance Co's* v. *356 Bales of Cotton,* 1 Peters 511, 546 (1828), the Court said, in discussing the analogous question of the power of Congress to establish courts in the territories:

> "* * * Although admiralty jurisdiction can be exercised in the States in those courts only which are established in pursuance of the 3d article of the Constitution, the same limitation does not extend to the territories. In legislating for them,

> Congress exercises the combined powers of the general and of a State government."

The petitioner was convicted of robbery in violation of Section 22-2901 of the District of Columbia Code. This statute was enacted by Congress pursuant to its power under Article I, Section 8, Clause 17, of the Constitution,[3] to exercise exclusive legislation over the District of Columbia; in other words, Congress in passing this statute was acting as a legislature for the District of Columbia, exercising the same powers that are vested in a state legislature. The jurisdiction conferred upon the District Court to try the petitioner for a violation of that statute was, in the language of this Court in the *O'Donoghue* case, "such authority as a State may confer on her courts." We submit that such jurisdiction, derived from Article I, may constitutionally be exercised by an Article I court or judge.

It is, of course, true that even though the jurisdiction of the District Court over the petitioner's case was derived from Article I of the Constitution, he was entitled "to the guaranties of personal liberty in the amendments and in the original constitution," *Keller* v. *Potomac Electric Power Co.,* 261 U.S. 428, 443; *Callan* v. *Wilson,* 127 U.S. 540 (1888); *District of Columbia* v. *Colts,* 282 U.S. 63 (1930). It does not follow, however, that among such guaranties was the right to be tried before an Article III court. On the contrary, it seems perfectly plain that Congress, in its

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[3] "The Congress shall have Power * * * To exercise exclusive Legislation in all Cases whatsoever, over such District (not exeeding ten Miles square) as may, by Cession of Particular States, and the Acceptance of Congress, become the Seat of the Government of the United States, * * *."

capacity as a legislature for the District of Columbia, might constitutionally provide for the trial of all District of Columbia criminal cases before an exclusively legislative court.

From the early days of the republic, Congress has recognized the unique character of its jurisdiction over the District of Columbia, and the unique status of the District of Columbia courts. In particular, Congress has recognized that the District of Columbia courts play a dual role, exercising at the same time the jurisdiction of United States District Courts and the jurisdiction of state courts. Thus, in 1801, Congress established the Circuit Court of the District of Columbia, consisting of a Chief Judge and two assistant judges, to hold their respective offices during good behavior and to "have all the powers by law vested in the circuit courts and the judges of the circuit courts of the United States."[4] In 1802, Congress provided that the chief judge of the District of Columbia "shall hold a district court of the United States, in and for the said district, on the first Tuesday of April, and on the first Tuesday of October in every year, which court shall have and exercise, within the said district, the same powers and jurisdiction which are by law vested in the district courts of the United States."[5] In 1838, Congress established a criminal court in the District of Columbia, "for the trial of *all* crimes and offenses against the laws now in force in said District, and such as may be hereafter enacted."[6] (Emphasis added.)

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[4] Act of Feb. 27, 1801, 2 Stat. 103, 105, 106.

[5] Act of April 29, 1802, 2 Stat. 156, 166.

[6] Act of July 7, 1838, 5 Stat. 306.

All criminal cases pending in the circuit court were transferred to the new criminal court. The criminal court was composed of one judge, appointed by the President by and with the advice and consent of the Senate. The statute, however, did not specify that the judge should hold office during good behavior, and his salary was fixed at $2,000 per annum, in contrast to the $2,700 salary of the Chief Judge of the circuit court and the $2,500 salaries of the two assistant judges.[7] This criminal court functioned until 1863, when it was abolished, along with the Circuit Court and the District Court and the Supreme Court of the District of Columbia was established.[8] The Supreme Court of the District of Columbia was given general jurisdiction in law and equity, and its judges were to be appointed by the President, by and with the advice and consent of the Senate, and to hold office during good behavior. In explaining the bill on the floor of the Senate, Senator Harris said:

> "The judiciary of this District was established in 1801, and for the last sixty years, year after year, Congress has been patching up the system. It is complicated; it is incongruous.[9]
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> * * *
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> "Mr. President, I have already stated that this bill contemplates a single and efficient organization of the courts in this District. It proposes to abolish the circuit court, composed now of three judges. It proposes to abolish the district court, which is held, as I understand, by the chief justice

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[7] Act of March 3, 1811, 2 Stat. 660; Act of April 20, 1818, 3 Stat. 457.

[8] Act of March 3, 1863, 12 Stat. 752.

[9] Cong. Globe, 37 Cong. 3d Session, p. 1051, Feb. 18, 1863.

> of the circuit court. It proposes to abolish the criminal court, of which there is a single judge, although that office is at present vacant. It proposes to organize in lieu of all of these courts—the circuit court, the district court, and the criminal court—a single court, to be composed of four judges, each of whom shall have jurisdiction to hold a circuit court or a district court or a criminal court, and shall have jurisdiction to hold a special term for the trial of equity causes, and to hold a circuit court for the trial of questions of law. The court is to be composed of four judges having this peculiar jurisdiction, abolishing all these other courts.[10]

In 1870, Congress established the Police Court of the District of Columbia, to have "original and exclusive jurisdiction over all offenses against the United States committed in the District of Columbia, not deemed capital or otherwise infamous crimes, that is to say, of all simple assaults and batteries and all other misdemeanors not punishable by imprisonment in the penitentiary.[11] Prosecutions in the Police Court were by the United States Attorney.[12] Finally, in 1942, the Police Court was merged with the Municipal Court for the District of Columbia, with the same criminal jurisdiction formerly exercised by the Police Court.[13] The term of the old Police Court Judges was six years and the term of the Municipal Court Judges is now ten years.[14]

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[10] Cong. Globe, 37 Cong. 3d Session, p. 1137, Feb. 20, 1863.

[11] Act of June 17, 1870, 16 Stat. 153; See *Callan* v. *Wilson,* 127 U.S. 540 (1888) and Act of March 3, 1891, 26 Stat. 848.

[12] 16 Stat. 156.

[13] Act of April 1, 1942, 56 Stat. 190, 192 D.C. Code (1951) Title 11, Sec. 751, 755: D.C. Code (1961) Title 11, Sec. 751, 755(a), 755a.

[14] D.C. Code (1961) Title 11, Sec. 753.

Concurrently with the United States District Court, the Municipal Court now has original jurisdiction, with some few exceptions, "of all crimes and offenses committed in the said District not deemed capital or otherwise infamous and not punishable by imprisonment in the penitentiary."[15] This includes jurisdiction over many offenses constituting violations of general federal statutes, which if they occurred in a state would be tried in a United States District Court. Examples of such offenses are: embezzlement or larceny from the United States, when the value of the property involved is less than $100;[16] unauthorized wearing of military medals and decorations;[17] misuse of name by a collection agency or a private detective agency to indicate that it is a federal agency;[18] instigating or assisting an escape of a federal prisoner charged with a misdemeanor;[19] refusal to answer a census question or giving a false answer.[20]

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[15] D.C. Code (1961) Title 11, Sec. 755a: "The municipal court shall have original jurisdiction concurrently with the United States District Court for the District of Columbia, except where otherwise expressly herein provided, of all crimes and offenses committed in the said District not capital or otherwise infamous and not punishable by imprisonment in the penitentiary, except libel, conspiracy, and violation of the post-office and pension laws of the United States; and also of all offenses against municipal ordinances and regulations in force in the District of Columbia. The said court shall also have power to examine and commit or hold to bail, either for trial or further examination, in all cases, whether cognizable therein or in the District Court of the United States for the District of Columbia."

[16] 18 USCA 641.

[17] 18 USCA 702.

[18] 18 USCA 712.

[19] 18 USCA 752.

[20] 13 USCA 221.

From this brief history, it is clear that the trial before a legislative court of persons accused of crime in the District of Columbia is, in the language of Circuit Judge Prettyman, "nothing new." On the contrary, these trials have been taking place since the earliest days of the District of Columbia. We submit that the court below was clearly right in its conclusion that such trials are proper, in view of the broad sweep of Congressional authority over the Federal District. Both reason and the legislative precedents of more than a century support the decision of the Court of Appeals.[21]

If the petitioner is correct in his argument that the trial of a criminal case in the District of Columbia

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[21] It may be noted that on the civil side, the Municipal Court of the District of Columbia has exclusive jurisdiction of actions "including counterclaims and crossclaims, in which the claimed value of personal property or the debt or damages claimed, exclusive of interest, attorney's fees, protest fees, and costs, does not exceed the sum of $3,000 and, in addition, shall also have exclusive jurisdiction of such actions against executors, administrators and other fiduciaries". D.C. Code (1961) Title 11, Sec. 755(a). Moreover, D.C. Code (1961) Title 11, Sec. 756(a) provides:

> "If, in any action, other than an action for equitable relief, pending on the effective date of this section or thereafter commenced in the United States District Court for the District of Columbia, it shall appear to the satisfaction of the court at any time prior to trial thereof that the action will not justify a judgment in excess of $3,000, the court may certify such action to the municipal court for the District of Columbia for trial. The pleadings in such action, together with a copy of the docket entries and of any orders theretofore entered therein, shall be sent to the clerk of the said Municipal Court, together with the deposit for costs, and the case shall be called for trial in that court promptly thereafter; and shall thereafter be treated as though it had been filed originally in the said Municipal Court, except that the jurisdiction of that court shall extend to the amount claimed in such action, even though it exceed the sum of $3,000."

before a "legislative" judge or court is unconstitutional, then the proceedings of the inferior District of Columbia criminal courts for over a hundred years have been unconstitutional and void. We submit that such a conclusion cannot be sound.

CONCLUSION

In conclusion, the *amici curiae* submit that the decision in the *Bakelite* case should be overruled; that the Court of Customs and Patent Appeals should be held to be a constitutional court; and that, in any event, the assignment of Judge Jackson to preside at the petitioner's trial did not violate the Constitution.

Respectfully submitted,

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January, 1962

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1961

No. 481

BENNY LURK,

Petitioner,

—v.—

UNITED STATES OF AMERICA.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

PETITIONER'S REPLY BRIEF

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by appointment of the
Court of Appeals.

February, 1962.

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PETITIONER'S REPLY BRIEF

This brief is filed on petitioner's behalf in response to certain contentions advanced by the United States in support of the opinion and judgment below, as reported at 296 F. 2d 360.

I

The De Facto Doctrine Is Inapplicable Where, as Here, the Judge Allegedly Lacks Constitutional Authority to Act.

In repetition of the claim advanced when this case was before the Court last term, the United States urges that Judge Jackson must be considered, at the least, a *de facto* judge whose title to office and whose exercise of authority cannot be challenged by petitioner, particularly where the challenge is made for the first time before the Court of Appeals.

But as the United States concedes (Brief, p. 28), the *de facto* doctrine relates only to those judges who in good faith and under color of authority possess and discharge the duties of a *de jure* office. As explained to this Court by the United States in its brief two terms ago in *United States* v. *American-Foreign Steamship Corp.*, 363 U.S. 685, No. 138, Oct. Term 1959, pp. 27-28:

> "The 'de facto' principle, in essence, has been applied where, unlike the case here, the judge's right to office is in question, or where, also unlike this situation, there has been an attack on some formal defect in a judge's authorization to act, such as in the case of designation and assignment. The 'de facto' doctrine does not reach the situation, such as the instant case, where a judge is expressly precluded from a specific type of judicial action by legislative mandate. *Were it otherwise, judges might then exceed their constitutional and statutory authority to act with impunity,* and the legislative prohibition of provisions like Section 46(c) would be completely undermined." [Emphasis added.]

In other words, where some constitutional or statutory provision forbids a judge from participating in a particular type of judicial proceeding, the *de facto* doctrine is inapplicable. To borrow the words of the Vermont Supreme Court in *Watson* v. *Payne*, 94 Vt. 299, 301:

> " . . . [W]here it is expressly declared by constitutional or statutory provision that in certain specified cases a judge shall not sit or shall not act, or shall take no part in the decision, the authorities are almost uniform to the effect that any judgment rendered by such judge in such case is *coram non judice* and void."

See also *People* v. *Bork*, 96 N.Y. 188; *Case* v. *Hoffman*, 100 Wis. 314, 352-358.

This Court has consistently recognized this ground of inapplicability of the *de facto* doctrine and the voidness of judgments rendered by those judges lacking statutory or constitutional authority to act. Thus in *American Construction Co.* v. *Jacksonville Railway*, 148 U.S. 372, where an appellate judge participated, contrary to statute, in an appellate decision setting aside an order entered by him as trial judge, the Court voided the decision and ruled (148 U.S. at 387):

> "If the statute made him incompetent to sit at the hearing, the decree in which he took part was unlawful, and perhaps absolutely void, and should certainly be set aside and quashed by any court having authority to review it by appeal, error or certiorari."

In *Frad* v. *Kelly*, 302 U.S. 312, 316, the order of a district judge was voided at the instance of a criminal defendant where the express provisions of the Probation Act negated the power of the judge to act after his designation and assignment to a particular court had expired. In *Ayrshire Collieries Corp.* v. *United States*, 331 U.S. 132, a judgment entered by two judges was voided where a statute required that the determination be made by three judges. Finally, in *United States* v. *American-Foreign Steamship Corp.*, 363 U.S. 685, 691, in reliance on the *American Construction* and *Frad* decisions, this Court voided an *en banc* judgment of a court of appeals in which a retired judge had participated contrary to a legislative mandate.

In this case, petitioner contends that Judge Jackson, as a retired legislative court judge, lacks constitutional authority to sit in the instant criminal proceeding and to exercise Article III judicial power. Indeed, the claim is